however, the ILECs are refusing CLEC attempts to interconnect with existing ILEC local data networks and facilities at the same time that they are seeking section 706 relief for their next generation data networks. ALTS properly reveals that these ILEC refusals to deal are predicated on specious rationalizations that are impermissible under the Act. Certain ILECs variously contend that "interconnection" does not encompass data services, frame relay is not an "exchange service," and existing interconnection agreements do not cover data facilities - ILECs are attempting to rewrite the 1996 Act to exclude data services. Their self-serving effort to limit their own obligations to link less efficient facilities that lack ADSL conditioning is a sham designed to impede the emergence of competition by CLECs. Worse still, cleaving ADSL from Section 706 would have repercussions not only on suppressing innovation that would otherwise flourish far wider under competitive deployment of ADSL in the telephone industry, but also it would irreparably suppress all the hybrid technologies conjoining conduit with either content or code. Without this innovation, the sources of investment that Congress anticipate will evaporate and frustrate the affirmative ends of the Act[49].

B. The Relief Sought Would Impede The Commission's Overarching Regulatory Goals to Improve Allocative Efficiency, Productive Efficiency and Innovative Efficiency

Regulatory policy, like antitrust policy, should be concerned with maintaining and

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networks with their own data networks.

[49] The Iowa Opinion affirmed that the competitive environment that the FCC's unbundling rules will result in more technological innovation than what occurs in the current monopolistic local telecommunications markets. It added "We believe that the increased incentive to innovate resulting from the need of a carrier to differentiate its services and products from its competitors' in a competitive market will override any theoretical decreased incentive to innovate resulting from the duty of a carrier to allow its competitors access to its network elements."

protecting at least three forms of economic efficiency: allocative efficiency, productive efficiency, and innovation efficiency. Under this view, the primary "efficiency" benefits of maintaining a competitive process are the creation and fostering of innovation and production efficiencies, with allocative efficiency (as defined by price theory) being a subsidiary benefit of organizing and operating an economy on the basis of a competitive process.[50] It is asserted that interfirm rivalry is maintained to foster the economic goal of insuring the "enhancement of aggregate social wealth (economic efficiency) subject to the constraint that consumers shall receive an appropriate share of such wealth (consumer welfare).[51] In order to insure these goals, it is argued that the key efficiency goals of regulatory enforcement should be fashioned in terms of dividing enforcement resources between, and with concern for, the relative importance of the three different forms of efficiency, with innovation efficiencies being the primary concern. A regulatory neglect of innovation efficiencies not only would not only sharply reduce investment dramatically as stated above, but result in an irretrievable loss of synergies between advanced technologies of different sectors including health, software, broadcast, computer equipment, education, and entertainment.

The policy advocated by ILECs is one that impedes the necessary introduction of interfirm rivalry among ADSL service providers, and thus presages costs in terms of foregone innovative efficiencies, productive efficiencies, and allocative efficiencies. In the context of

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[50] See, Joseph Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Process*, 62 N.Y.U. L. REV. 1020 (1987)(innovation efficiency is paramount consideration); *see also* F.M. Scherer, *Antitrust, Efficiency and Progress*, 62 N.Y.U. L. REV. 998 (1987).

[51] Brodley, *supra* note 50, at 1023.

Section 706, Bell Atlantic, Ameritech, and U S West filed petitions seeking certain regulatory relief to encourage their deployment of high-speed data services. In doing so, they invoked the language of Section 706 to urge the Commission to allow them alone to build and operate data networks -- such as packet- and ATM-based networks -- that cross LATA boundaries. These ILECs concurrently ask that they *neither be required* to (a) unbundle "non-bottleneck" network elements used to provide data services such as DSL, nor (b) make these competitive data services available at a wholesale discount for resale. These efforts are highly reminiscent of their monolithic predecessor's unlawful attempt to relegate other common carriers (OCCs or IXCs) seeking interconnection with the Public Switch Telephone Network to vastly inferior ENFIA connections, while deliberately and wantonly denying these new carriers access to Feature Group D and Equal Access. Unlike the ENFIA dispute, however, the law of the land today clearly requires unbundling of the UNEs under federal statute.

Advanced technology does not require new rules of engagement. This is particularly true in instances, as this one, where the capabilities were already anticipated. The economic cost of granting the instant relief and thereby coddling SBC in its aim to retain its concentrated power over provision and exclusive pricing prerogatives for ADSL and related technological improvements, would be enormous when viewed under a lens that evaluates allocative efficiency. Still worse, however, is the immeasurable cost that would be imposed on society, not as a result in the disruption of ordinary price mechanisms that promote consumer surplus, but in terms of losses from the suppression of technological innovations.[52] SBC has failed to

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[52]Others inside and outside the telecommunication industry implicitly rely or would rely on ADSL facilities, if the offerings were cost-based. The applications in the pipeline today extend

demonstrate why bottleneck facilities, identified as UNEs, necessarily lose their bottleneck characterization when considered in the context of ADSL service.[53] The distinctions that the ILEC make are either immaterial or illusory.

Absent unbundling for ADSL, the commercial viability of CLECs will be placed in jeopardy. Their ability to perform their central function hangs in the balance because they will not be able to compete effectively if the ILECs are allowed to exercise monopoly power to restrict output and raise prices on UNEs (or withhold collocation arrangements). Otherwise, the ILECs will resume their policies that disable CLECs from offering downstream customers and information providers needed broadband data services at cost-based rates negotiated at arms length from among several providers. The UNEs comprise parts of the local exchange facilities, which in turn are essential facilities, or bottlenecks, that for all practical purposes cannot be duplicated.

C. The CLEC's Provision of ADSL Services Depends Upon The Availabililty of Fair Terms To Use The ILECs's Bottleneck Facilities

In spheres of economic activity where industry is subject to antitrust law, as opposed to regulation by administrative agency, a refusal to deal "may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power

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from medicine and and international trade to education and art.

[53] To suggest, as the ILECs have, that the nation's pro-competitive telecommunication legislation and the consumer-protection oriented regulations that the FCC developed over decades does not, or should not, apply to ADSL or other broadband services for data, is as specious as urging that laws against consumer fraud for traditional business should categorically be suspended in application to any U.S. commerce over the Internet

from one stage of production to another, and from one market into another."[54] Courts have held that the antitrust laws protect customers and purchasers in cases when a monopolist refuses to deal in order to control a downstream market or to frustrate litigation.[55]

The antitrust laws impose on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.[56] SBC's UNE's are necessary to provide advanced ADSL and other high bandwidth data services and are "essential". This is particularly so, because they are indespensible to competitive viability and competitors cannot effectively compete in the relevant market without access to them.[57] For analysis in a competitive context, UNEs need not be indispensable, but their denial must "impose a severe handicap on potential market entrants."[58]

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[54] MCI Communications Co. v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1983), cert. denied, 464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983).

[55] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992) (opening up to review under the antitrust laws the right of supplier of parts for servicing supplier's equipment to refuse to deal with firms competing with supplier in repair services for the equipment in order to control downstream service market); Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725, 726 (3d Cir. 1962) (preliminary injunction granted where defendant drug company refused to sell its products to"purchasers" on the same terms as they are sold to other purchasers).

[56] MCI Communications Co., 708 F.2d at 1132; Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973), reh'g denied, 411 U.S. 910, 93 S. Ct. 1523, 36 L. Ed. 2d 201 (1973); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985) (access to essential facility must be granted by ski lift owner controlling seventy-five percent of the ski lifts);

[57] City of Anaheim v. Southern Calif. Edison Co., 955 F.2d 1373, 1380 n.5 (9th Cir. 1992) (a facility is "essential" if it is otherwise unavailable and cannot be "reasonably or practically duplicated").

[58] TCA Bldg. Co. v. Northwestern Resources Co., 873 F. Supp. 29, 39 (S.D. Tex. 1995). In the Iowa Opinion, supra at note 1, the court ruled that Subsection 251(c)(3) requires incumbent LECs to provide competing carriers with fairly generous unbundled access to their

Reasonable, cost-based, and timely access to UNEs, along with other support services and appurtanent information, that are necessary to compete are essential facilities.[59] Furthermore, a monopolist's unilateral refusal to deal violates @ 2 of the Sherman Act where such conduct unreasonably handicaps competitors or harms competition. [60]

For the fledgling ISPs, information service providers, and other potential market entrants also represented by CRISP, the assurances of open, cost-based, and non-discriminatory access to unbundled network elements supporting the ADSL services at stakes here are vital. Small businesses, for example, that need bidirectional bandwidth of 768 kbps to link their file servers on the Internet would use the more efficient ADSL services rather than non-xDSL alternatives for which ILECs may impose variable costs that are twice as high.[61] Without interfirm rivalry, there is little incentive for ILECs to price ADSL service anywhere near its economic cost. Without the emergence of effective competition in the provision of ADSL services, many small nitch companies that depend on the availability and timely implementation of this low-cost broadband services will fail to reach the critical mass

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network elements in order to expedite the arrival of competition in local telephone markets. Allowing incumbent LECs to evade their unbundling duties whenever a network element could be obtained elsewhere would eviscerate unbundled access as a means of entry and delay competition, because many network elements could theoretically be duplicated eventually.

[59] See Bellsouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc., 719 F. Supp. 1551, 1566 (S.D. Fla. 1988), aff'd, 933 F.2d 952 (11th Cir. 1991).

[60] Image Technical Services v. Eastman Kodak, 125 F.3d 1195,1209 (9th Cir. 1997).

[61] Put another way, many new small businesses will not even open their doors if their planned six percent profit margins will be eroded by exhorbitant ILEC data service costs to connect to the local exchange that remain 100 percent above ADSL costs.

they need to continue operations. If startup CLEC and ISPs are found commercially strangled in the crib by these needlessly higher costs, ILEC relief will not comport with the investment incentives Congress sought to establish.

Without rules to simulate competitive market conditions the benefits of market efficiencies are surrendered. Start-ups that begin as an information provider with intentions to evolve into an internet service provider or CLEC, and there are many, will find that the evolution of their business plans is based on a fantasy that once was a Congressional mandate. SBC's request, in short, seeks to lead the Commission astray and backwards. SBC asks the Commission to condone the ILECs' perpetuation of an artificial environment of concentrated control of UNEs, at the expense of the consumers' choice of service providers.

Where a competitor so dominates a bottleneck market or function within a market that it has in effect become the sole authority setting standards for the market it occupies or has the power to determine access to markets dependent upon the bottleneck, it has significant power over the operation of markets upstream and downstream.[62] The power possessed must be carefully monitored or actively constrained if innovation in related markets is not to be unduly controlled, diminished or totally suppressed.

In a competitive market, manufacturers and service providers alike face enormous

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[62] This is a practical reality long recognized as a characteristic of some industries, but one requiring complex injunctive remedies where the antitrust laws are relied upon to remedy the injury to the competitive process. *See* United States v. Terminal Railroad Assn., 224 U.S. 383 (1912).

pressure to retain customers and penetrate new markets by customizing their offerings to satisfy customer needs even when it means unbundling elements, features, and functionalities. The exemption sought by SBC would send the wrong signals by insulating SBC in its uncontested provision of ADSL from any competitive pressures that would otherwise raise its customer responsiveness. As a result, SBC and other ILECs would build in inefficiencies to further afflict industries seeking to use and dessiminate the valuable by-products lower cost high capacity facilities and other improved technologies. The Commission should continue its efforts to replicate more closely competitive conditions by declining the instant petition.

D. Outside Regulated Industries, A Dominant Firm May Not Leverage Monopoly Power from Bottleneck Control in One Market into Adjacent Markets

If the Commission were to deem the availability of UNEs that support ADSL beyond the scope of the applicable regulatory regime, SBC and other ILECs could instantly leverage their monopoly power of the local exhange facilities into this deregulated market for ADSL. The courts have found against monopolists that improperly used its monopoly power in its uncontested market to extend or leverage their power into service markets for which others could effectively compete.[63] Unlawful monopoly leveraging occurs where a firm uses its market power in one market to gain competitive advantage in another market other than by competitive means. [64] The requirements for liability under a monopoly leveraging claim

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[63] See Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 at 479 n. 29 (1992) ("The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next.").

[64] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979), cert. denied, 444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980) (The use of monopoly power

include: "monopoly power in one market; the use of that power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another market; and injury caused by the challenged conduct." [65] These tenets of law do not lose their potency in the process of application to the realm of advanced information technologies.[66] This Commission should similarly conclude that SBC is unlawfully using its monopoly in the exchange facility service market to foreclose or restrain competition by CLECs in the ADSL relevant market.

As ALTS indicates, the ILECs have already entered that market and have clearly announced plans to expand in that market while at the same time denying CLECs and others access to the UNEs for ADSL and other broadband data services, even though the CLECs need UNEs and some reasonable cooperation to compete. This relief, if granted, will unnecessarily "handicap" or restrain the CLECs ability to compete in that market.

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attained in one market to gain a competitive advantage in another is a violation of @ 2, even if there has not been an attempt to monopolize the second market.").

[65] Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 681 (2d Cir. 1985).

[66] See United States v. Microsoft, 980 F. Supp. 537, 1997 U.S. Dist. LEXIS 19496 (preliminary injunction was proper because of the danger that Microsoft would be able to leverage its existing monopoly in the computer operating systems market over the market for Internet browsers. "The probability that Microsoft will not only continue to reinforce its operating system monopoly by its licensing practices, but might also acquire yet another monopoly in the Internet browser market, is simply too great to tolerate indefinitely. . . . Those practices should be abated until it is conclusively established that they are benign." Microsoft, 1997 U.S. Dist. LEXIS at *23.

V. CONCLUSION

For the reasons stated above, CRISP opposes the Petition and therefore urges the Commission to reject SBC's requests to carve out an exemption for ADSL services. SBC's request for an exemption does not state a colorable claim upon which the Commission's relief may be granted under the Telecommunications Act of 1996 or in accordance with other applicable law. SBC's request is a sham that evinces the ILECs' continuing perception that it is cost-effective for its shareholders to delay compliance with the law through litigation rather than to implement the vital unbundling programs urgently needed by those who heavily rely on competition-driven provision of advanced broadband technological capabilities.[67]

Respectfully submitted,

COALITION REPRESENTING INTERNET SERVICE PROVIDERS

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June 23, 1998

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[67] See, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); Eastern RR Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, at 144 (recognizing the sham exception). SBC's ostensible campaign for governmental action, is nothing more than an attempt to interfere with the business of existing and prospective competitors. Because SBC's Petition is frivolous, it should defray opposing counsels attorneys fees in amount according to the Commission's order, under 47 USC Sec.206 and other applicable law.

CERTIFICATE OF SERVICE

I, Barbara D. Solomon, do hereby certify that true and correct copies of the foregoing "OPPOSITION OF THE COALITION REPRESENTING INTERNET SERVICE PROVIDERS" were served this 23nd day of June 1998, by first class mail, postage prepaid, upon the attached parties.

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